

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 22.07.2010
Judgment delivered on: 26.07.2010

+ **R.S.A. No.181/2007 &**
C.M.Appl.Nos.9429/2007 & 3045/2008

KUNTI DEVI Appellant
Through: Mr.P.D.Gupta, Advocate

Versus

1. SHEHNAZ MANSOOR
2. MANSOOR JAMAL
3. DELHI DEVELOPMENT AUTHORITY
4.MUNICIPAL CORPORATION OF DELHI Respondents
Through: Mr.L.K.Singh, Advocate for the
respondent no.1 &2.
Mr.Mitesh Mishra and
Mr.Shashi Ranjan, Advocates
for respondent no.3

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. Kunti Devi is the appellant in this second appeal. She had commenced litigation in the trial court by filing a suit for permanent and mandatory injunction on 17.4.1996. It had been averred that Mst.Shehnaz Mansoor and Mansoor Jamal (respondents in the present appeal who have filed cross objections) are illegal and unauthorized occupants in the suit property. She had accordingly sought a prayer restraining them from making any further construction in property no.6514, Ahata Kidara Estate, Idgah Road, Delhi. A second prayer had been made that the

defendants should be directed to demolish all illegal/unauthorized construction already raised by them.

2. The case of the plaintiff was that she had become the owner of this property after the death of her husband Pishori Lal Sahni by virtue of a will dated 26.9.1974. Her husband had purchased this property from its erstwhile owner vide sale deed dated 7.1.1972. A portion of this property measuring about 50 sq.yds. had been sold to defendant no.1. A part portion was under the tenancy of Hari Om who has since vacated the property and handed over the same to defendant no.1 who was in unauthorized and illegal occupation of the same.

3. Defendants no.1 & 2 in their written statement had stated that the plaintiff has no right and title to the suit property. She has sold the same to Vijay Kumar and Raman Kumar who in turn had sold it to the answering defendants vide an agreement to sell dated 11.7.1994 and they are in legal and lawful occupation of the suit premises.

4. Seven issues were framed before the trial court. Issues no.5 & 6 relating to the relief sought by the plaintiff for permanent and mandatory injunction were decided together. It was held that the plaintiff had proved Ex.PW-1/1 dated 7.1.1972 which was a conveyance deed depicting the ownership of the property with her husband. The letter of mutation executed by the MCD in her favour was exhibited as Ex.PW-1/2. Trial court had further noted that it was admitted case between the parties that the plaintiff had thereafter sold some portion of the suit property to defendant no.1; case of the defendant was that he had purchased this share of the property from Raman Kumar and Vijay Kumar. The defendants had

proved on record Ex.DW-1/P-2 which was the judgment of the sub-judge decreeing a suit for specific performance in favour of Raman Kumar and Vijay Kumar directing the plaintiff i.e. Kunti Devi to execute the sale deed in respect of half portion of the suit property i.e. 6514, Sadar Thana Road, Western Side in favour of Raman Kumar and Vijay Kumar. The defendants had proved this document on record to substantiate their submission that in this manner Raman Kumar and Vijay Kumar had become the owner of this half portion of the property and defendants no.1 & 2 had validly purchased this half portion from the said Vijay Kumar and Raman Kumar in the year 1994. It had further come on record that this decree for specific performance which was passed between the parties had never been executed. Trial court had further held that these facts which were material for the controversy in issue had been concealed by the plaintiff. Her testimony was suspect. She was not entitled to the discretionary relief sought by her for mandatory injunction. Trial court had held that apart from the decree Ex.DW-1/2 passed in the suit inter se between the Kunti Devi and Raman Kumar and Vijay Kumar, there was no documentary evidence of ownership of the suit property with defendants no.1 & 2. Further the decree for specific performance had not been executed and as such there was no effective legal title with Raman Kumar and Vijay Kumar on the basis of which they could have sold this property to Defendants no.1 & 2. Vijay Kumar and Raman Kumar themselves not having got any sale deed executed in their favour; they could not have transferred a better title to defendants no.1 & 2 and as such defendants no.1 & 2 were held to be unauthorized occupants in the suit property. Defendants

no.1 & 2 were however restrained from raising any illegal construction in the suit property. Suit was disposed of in the above terms.

5. Judgment of the trial court was upheld in appeal. The appeal was disposed of on 21.4.2007. Appellate court had held that to effect a transfer of immovable property of more than Rs.100/- a compulsory registration under Section 17 of the Registration Act, 1908 is mandated. Provisions of Section 49 of the said Act were also considered and their effect thereto. Findings of the trial court were accordingly upheld.

6. The second appeal was admitted on 3.9.2008 on which date the following substantial questions of law raised by the parties i.e. by the appellant and the respondents (in their cross objections) were formulated. Order dated 3.9.2008 inter alia reads as under:

“Whether the courts below were justified in declining the relief of mandatory injunction to the appellant after holding that the respondents no.1 and 2 were in unauthorized occupation of the suit property?”

Insofar as the cross-objection of the respondent are concerned, the following substantial question of law arises for consideration:-

“Whether the status of respondents no.1 & 2 in the suit property could be said to be that of an unauthorized occupant despite the fact that they claimed to be successor-in-interest of Raman Kumar and Vijay Kumar who enjoyed legal protection?”

7. Respondent has pleaded the doctrine of part performance as contained in Section 53-A of the Transfer of Property Act (hereinafter referred to as ‘the TPA’) to substantiate his arguments of a legal possession. For this proposition reliance has been placed upon (2002) 3 SCC 676 Shrimant Shamrao Suryavanshi & Anr. vs. Pralhad Bhairoba Suryavanshi (dead) by LRs & Ors. It is submitted that keeping in view the object and purpose for which this

provision was engrafted in the said Act, the defence of a transferee to protect his possession is available to the present respondent. Reliance has also been placed upon AIR 1957 Andh.Pra.854 Yenugu Achayya & Anr. vs. Ernaki Venkata Subba Rao & Ors.; the defence of possession by the transferee against the transferor can be enforced. It is submitted that AIR 1983 Punjab & Haryana 323 Chaman Lal vs. Surinder Kumari also supports the stand of the respondent; to the same effect is the propositions as laid down in the judgment reported in AIR 2000 Bombay 337 Balasaheb Manikarao Deshmukh and Anr. vs. Rama Lingoji Warthi.

8. The objection raised by the learned counsel for the appellant that the defence of Section 53-A of the TPA had not been taken in the written statement and nor raised in the first appeal; it cannot now be agitated. This argument has to be noted only to be rejected. The facts of the case are admitted; there is no dispute on them. It is only the legality of the doctrine which has to be interpreted and which finds specific reference in the cross objections filed by the respondent. There is no merit in this objection of the respondent.

9. Section 53-A of the Transfer of Property Act, 1882 has been imported from the english equitable doctrine of part performance which was inserted principally for the protection of ignorant transferees who take possession or spend money for improvements, relying upon documents which are ineffective as transfers or on contracts which cannot be proved for want of registration. The protection given by this Section is available to a defendant who is in possession; being an exception to the express provision that contracts of immovable property require compulsory

registration, such a defence if and when taken has to be strictly construed.

10. The conditions necessary for the application of this doctrine are:

- (i) That the transferor has contracted to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;
- (ii) that the transferee has in part performance of the contract take possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract;
- (iii) that the transferee has done some act in furtherance of the contract; and
- (iv) that the transferee has performed or is willing to perform his part of the contract.

This had been reiterated by the Supreme Court in AIR 1970 SC 546 Nathulal vs Phool Chand.

11. The contention of the defendant that the aforementioned ingredients have been fulfilled in his case and he is entitled to the defence under this doctrine of part performance finds force.

12. Admittedly, the suit inter se for specific performance and permanent injunction filed by Vijay Kumar and Raman Kumar against Kunti Devi had been decreed vide judgment Ex.DW-1/P-2 dated 21.7.1982 which has since attained finality. This judgment had been passed by the court of Shri D.S.Bawa. Initially, the plaintiff had not brought these facts to the knowledge of the court but when the defendants produced a certified copy of the said judgment, she had no answer. It was proved on record that in terms of this judgment the plaintiff Kunti Devi had been directed to execute the sale deed of half portion of the suit property in favour of Raman Kumar and Vijay Kumar. It had also come on record that this decree had not been executed and the sale deed had not been

executed by Kunti Devi in favour of Raman Kumar and Vijay Kumar. The defendants were thus purchasers of this half portion of the suit property from Raman Kumar and Vijay Kumar in whose favour admittedly no sale deed had been executed. It has however been proved on record that Raman Kumar and Vijay Kumar had established their right to obtain a decree of specific performance against Kunti Devi qua this suit property and in terms of which they had transferred their rights in this suit property to the present defendants. The present defendants are claiming their title through Raman Kumar and Vijay Kumar. PW-1 in her version before the trial judge has also admitted that the defendants are in possession of this portion of the suit property since 1994 i.e. much before her filing the present suit which had been filed by her on 17.4.1996.

13. In (2003) 7 SCC 350 Ramesh Chand Ardawatiya vs. Anil Panjwani while construing the provisions of Section 53-A of the TPA, the Supreme Court had held that if a transferee is in possession in part performance of a contract for sale such a transferee may protect his possession even against the true owner. He will not have title to the property yet if he has been inducted into the possession by the rightful owner and is in peaceful and settled possession of such property he is entitled in law to protect the possession until dispossessed by due process of law by a person having a title better than what he has.

14. Applying the ratio of this judgment, it is clear that the respondents had obtained valid and legal possessory rights from Raman Kumar and Vijay Kumar and were in possession of the suit property, even as per the plaintiff w.e.f. 1994. Respondents are

since then in peaceful and settled possession of this property. They are thus entitled in law to the protective umbrella of a legal possession until dispossessed by a due process of law. The finding of the courts below in declaring them to be in unauthorized possession and unlawful occupants is an incorrect finding based on an incorrect proposition of law. Such a transferee is adequately protected under Section 53-A of the Transfer of Property Act.

15. The cross-objection filed by the respondent are accordingly answered as follows:

The respondents/defendants are protected under the shield of Section 53-A of the Transfer of Property Act; respondent no.1 & 2 were successors in interest of Raman Kumar and Vijay Kumar who had legal possessory rights who in turn transferred the same to respondents no.1 & 2; respondents no.1 & 2 are not unauthorized occupants but being in peaceful and settled possession of this property are entitled in law to be protected until dispossessed by a due process of law.

16. The substantial question of law raised by the appellant reads as follows:

“Whether the courts below were justified in declining the relief of mandatory injunction to the appellant after holding that the respondents no.1 & 2 were in unauthorized occupation of the suit property?”

17. This question had been framed qua the query raised by the appellant wherein she was aggrieved by the fact that her relief for mandatory injunction had been declined notwithstanding the fact that respondent no.1 & 2 had been held to be in unauthorized occupation of the suit property.

18. The finding of this court on the cross objection preferred by the respondents no.1 & 2 is that respondents no.1 & 2 are in legal occupation of the suit property. Nevertheless this substantial question of law has to be answered.

19. Plaintiff had filed a suit for permanent and mandatory injunction. The title deed of the suit property Ex.PW-1/1 and the letter of mutation executed by the MCD in her favour had been proved as Ex.PW-1/2. It has also come on record that a decree for specific performance had been passed in favour of Raman Kumar and Vijay Kumar and the plaintiff Kunti Devi had been directed in terms of judgment Ex.DW-1/P-2 to execute the sale deed in favour of Raman Kumar and Vijay Kumar qua this suit property; yet this decree remained unexecuted. The registered title of the suit property continued to vest in name of the plaintiff.

20. The suit of the plaintiff had been partly decreed by the trial court. Testimony of PW-1 the plaintiff who had proved these documents of title had been taken into consideration. She was admittedly not in possession of the suit property since 1994 i.e. prior to the date of filing of the suit. The trial judge had appreciated her version that she was making bi-monthly visits to the suit property, not knowing how many floors are constructed there or which part of the property had been illegally or unauthorizedly constructed or when such construction had been raised by respondents no.1 & 2 in the suit property. Written statement filed by D-4/MCD was also rightly considered wherein it had been stated that no unauthorized construction of the suit property had been noticed by the department; the inspection note was dated 13.1.2003.

21. The mere bald averment of the plaintiff that there was unauthorized construction raised by the defendant without specifying the details therein which remained unsupported by the version of the MCD, was held to be one reason for declining to the plaintiff the relief of mandatory injunction. There was yet another reason. PW-1 in her version on oath had denied that any decree dated 21.7.1982 had been passed against her in the suit filed by Raman Kumar and Vijay Kumar for specific performance. In spite of notice under Order 12 Rule 8 CPC having been served upon the plaintiff to produce the documents relating to the said suit, she failed to produce them. She even denied that any suit had been filed by Rakesh Kumar and Vijay Kumar against her. It was only when the judgment and the decree Ex.DW-1/P2 had been brought on record that the plaintiff had no answer. These were held to be material suppressions by the plaintiff which had been held to be another ground for disentitling her to the discretionary relief of mandatory injunction. Defendants were however restrained from making any further construction in the suit property.

22. In ILR (2001) II Delhi 690 Rohit Dhawan Vs. G.K.Malhotra & Anr. on an application under Order 39 Rule 1 & 2 CPC seeking grant of a temporary injunction material facts relating to the factum of the termination of earlier agreements between the plaintiff and the defendant having been suppressed, the relief of injunction had been refused. It was held that a deliberate attempt on behalf of either party to suppress material facts would disentitle such a party for such a relief.

23. In I (2009) SLT 231 G. Jaysharee & Ors. Vs. Bhagwandas S. Patel & Ors., the Supreme Court had held while determining the lis

in a suit for specific performance of a contract, no legal principle in absolute terms can be laid down; relief of mandatory injunction is contained in Section 39 of the said Act; Court has to weigh the amount of mischief done or threatened to the plaintiff and compare it with that of the defendant in the event of grant of an injunction. Applying the ratio of this principle the balance of convenience in these circumstances does not lie in favour of such a plaintiff.

24. There is no dispute to the proposition that the relief of injunction is a discretionary relief and a discretion which is vested in the Court has to be exercised fairly, judiciously and not capriciously or arbitrarily. Vital facts which have a direct and material bearing on the case and which are deliberately and intentionally not brought to the notice of the court in spite of specific queries and questions raised amount to an intentional concealment; such a party has not come to the court with clean hands; such a party is not entitled to the discretion of the court.

25. Applying these principles as also the facts of the case it was rightly held by the courts below that the plaintiff was not the right person who could be relied upon to substantiate the averments that there had been any illegal or unauthorized construction by the defendants. The relief of mandatory injunction had rightly been refused by the Courts below.

26. The argument of the learned counsel for the appellant that the MCD had, in fact, played a fraud upon the court; the inspection note dated 13.1.2003 evidences that the inspection had been conducted in the year 2003 i.e. almost nine years after the plaintiff had filed her suit; this delay in the inspection by the department was for deliberately malafide reasons; the entire proceedings stand

vitiating is an argument which necessarily has to be repelled. This is not a fact finding court; the two fact finding courts below were the courts who could delve into the facts. The allegation of fraud qua the MCD made at this stage does not in any manner advance the substantial question of law which has been raised before this court.

27. Substantial questions of law are answered accordingly. Appeal is disposed of in the above terms. All the pending applications are also disposed of.

INDERMEET KAUR, J.

JULY 26, 2010

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